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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 476

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Statutes or treaties involved	3
Statement of the case	4
The rulings below	13
The questions involved are substantial	17
Appendix "A"—Report and order of the Interstate Commerce Commission	22
Appendix "B"—Order of the Interstate Commerce Commission of March 16, 1951	37
Appendix "C"—Opinion and judgment of the United States District Court	39

Table of Cases Cited

Arizona Grocery Co. v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370	12, 19, 20
Atchison, T. & S. F. Ry. Co. v. *U. S.*, 284 U. S. 248	9
Ayrshire Collieries Corp. v. *U. S.*, 335 U. S. 573	11
Baltimore & Ohio R. Co. v. *U. S.*, 22 F. Supp. 533	6
Erie R. Co. v. *U. S.*, 64 F. Supp 162	6, 14
Florida v. *U. S.*, 282 U. S. 194	6
Furniture, L.C.L. from, to and between the East, I. & S. Docket No. 5677	4
Furniture L.C.L. from or to Illinois Territory, I. & S. Docket No. 5694	4
Furniture, L.C.L., from or to Illinois Territory, I. & S. Docket No. 5832	4
Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U. S. 671	19
Mitchell v. *U. S.*, 313 U. S. 80	2
Texas & Pacific Ry. Co. v. *U. S.*, 289 U. S. 627	2
United States v. *Pierce Auto Freight Lines*, 327 U. S. 515	2

Statutes Cited

	Page
Administrative Procedure Act, Section 10 (3) (60 Stat. 243, Title 5, United States Code, Section 1009(e))	4
Interstate Commerce Act:	
Section 1(4)	3
Section 1(5)	3
Section 2	3
Section 3 (1)	3
Section 14(1)	3
Section 15(7)	3
United States Code, Title 28:	
Section 1253	2
Section 1336	4
Section 2101(b)	2
Section 2321-2325	4
Section 2325 (62 Stat. 970, 28 U.S.C. 2325)	2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION

[Filed November 9, 1951]

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, National Furniture Traffic Conference, Inc., Plaintiff-Appellant, submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the United States District Court for the District of Massachusetts (hereinafter called the Court), made and entered in this cause.

Opinion Below

The opinion of the Court was rendered on September 5, 1951, and is unreported as yet. A copy of said opinion,

as amended, and a copy of the judgment are attached hereto and marked Appendix C and Appendix D, respectively.

Jurisdiction

The jurisdiction of the Supreme Court of the United States to review, upon direct appeal, the final judgment entered herein is conferred by Title 28, United States Code, Section 1253, which provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Inasmuch as this proceeding was brought to enjoin an order of the Interstate Commerce Commission (hereinafter called the Commission), it was a proceeding required to be heard and determined by a district court of three judges, pursuant to the provisions of Chapter 646 of the Revised Judicial Code, Section 2325 (62 Stat. 970, Title 28, United States Code, Section 2325). The judgment herein was a final judgment, entered on September 11, 1951. The plaintiff-appellant's application for appeal is presented herewith, on November 9, 1951, and accordingly within the period of time provided for the taking of such appeals, pursuant to the provisions of Title 28, United States Code, Section 2101(b).

The following decisions, among others, sustain the jurisdiction of the Supreme Court of the United States to review upon direct appeal the judgment herein: *Texas & Pacific Railway Co.* v. *United States,* 289 U. S. 627 (1933); *Mitchell* v. *United States,* 313 U. S. 80 (1941); *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1947).

Statutes or Treaties Involved

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

The construction of various provisions of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379; Title 49, United States Code, Section 1 et seq.), as amended (hereinafter called the Act), is involved, however. These provisions include the provisions of Section 1(4) and 1(5) of the Act (Title 49, United States Code, Section 1(4) and 1(5)), requiring the establishment and maintenance of just and reasonable, and prohibiting unjust and unreasonable, rates, fares and charges for railway transportation; the provisions of Section 2 of the Act (Title 49, United States Code, Section 2), prohibiting unjust discrimination between like kinds of traffic under substantially similar circumstances and conditions; the provisions of Section 3(1) of the Act (Title 49, United States Code, Section 3(1)) forbidding undue preference or advantage in favor of, and undue prejudice or disadvantage against, any "particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic"; the provisions of Section 14(1) of the Act (Title 49, United States Code, Section 14(1)), which define the obligations of the Commission with respect to reports made upon its investigations, and the provisions of Section 15(7) of the Act (Title 49, United States Code, Section 15(7)), which confer upon the Commission the power to suspend the operation of any new schedule of rates, pending investigation thereof, and which place upon the carrier proposing a new schedule of rates the burden of proving that it is just and reasonable.

Also involved in this proceeding is the matter of the construction of the provisions of Section 10(e) of the

Administrative Procedure Act (60 Stat. 243, Title 5, United States Code, Section 1009(e)) with respect to the scope of judicial review of decisions by administrative agencies.

Statement of the Case

This proceeding was instituted in the Court, pursuant to the provisions of Title 28, United States Code, Sections 1336 and 2321 through 2325, inclusive, to enjoin, set aside and forever annul a certain order of the Commission dated November 20, 1950, in proceedings entitled, respectively, I. & S. Docket No. 5677—*Furniture, L. C. L., From, to and Between the East;* I. & S. Docket No. 5694—*Furniture, L. C. L., From or to Illinois Territory;* and I. & S. Docket No. 5832—*Furniture, L. C. L., From or to Illinois Territory,* and officially reported at 279 I. C. C. 509. A copy of said order and of the Commission's report on which it is based are attached hereto and marked Appendix B and Appendix A, respectively.

The order of the Commission which the plaintiff sought to have enjoined, annulled and set aside has the effect of approving very substantial increases in freight charges on many articles of furniture and other non-furniture items (including baby walkers, clothes hampers, store display racks and stands, baby and doll carriages, gocarts and sulkies and other children's vehicles) when moving by rail in less-than-carload lots to, from and within the northeastern part of the United States. The Commission's order has such effect because it approves the cancellation by the principal rail carriers in Official Territory[1] of the high level first class and second class exceptions ratings, so-called, upon which these various furniture and non-furniture

[1] Official Territory comprises, generally, that part of the United States which is east of the Mississippi River and north of the Ohio and Potomac Rivers.

articles have been moving for approximately twenty years (a fact which belies the railroads' contention that such ratings are "depressed" and geared only to depression-period economics), and the substitution therefor of still higher classification ratings. The average amount of the increase in freight charges resulting from cancellation of the exceptions ratings is, as the Commission finds, between 58.7% and 76.3%, and these increases are made applicable to rates which have already been increased (in general rate increase proceedings) by approximately 80% since 1946.

The resulting increases in freight charges apply only upon shipments moved by the principal (but not by all) Official Territory carriers within Official Territory and upon interterritorial shipments to or from Official Territory points on their lines. The southern and western railroads are continuing the long-standing and more favorable exceptions ratings in force on shipments moving within and between their respective territories, and a substantial number of Official Territory carriers are also continuing such exceptions ratings on traffic to and from points on their lines.

In its appeal to the District Court, the plaintiff pointed out that, although the Commission's report contained the ultimate finding or conclusion that the schedules which contained the proposed new and drastically increased classification ratings "are just and reasonable and not otherwise unlawful", this ultimate conclusion was utterly devoid of support by adequate subsidiary findings, and that, moreover, the record before the Commission was wholly devoid of any evidence to support the Commission's ultimate finding or from which the Commission could have made subsidiary findings in support of its ultimate conclusion.

In support of its contention that the Commission's order is void by reason of the Commission's failure to support its ultimate conclusion by adequate subsidiary findings, the plaintiff first stressed the policy considerations underlying the rules laid down in such cases as *Florida* v. *United States*, 282 U. S. 194 (concerning the necessity for findings of the basic or quasi-jurisdictional facts); *Baltimore & Ohio R. C.* v. *United States*, 22 F. Supp. 533 (wherein Judge Hand pointed out the necessity of findings of the basic facts to the extent necessary to reveal the legal theory on which the Commission had proceeded) and *Erie R. Co.* v. *United States*, 64 F. Supp. 162 (wherein the Commission's reliance upon facts "conceivably known" to it but not in evidence was specifically denounced). These rules have a common vital purpose in that they all are designed to safeguard the right of judicial review of Commission orders and to prevent Commission proceedings from degenerating into mysterious rites from which a court would be expected to retreat in noncomprehending awe.

To support its contention that the Commission's ultimate conclusion is, in fact, not supported by *adequate subsidiary findings*, the plaintiff analyzed the report in detail (and urged the Court to do the same), in search for *any basis* in such *findings* as the Commission made for its ultimate conclusion that the classification ratings which it was approving are "just and reasonable and not otherwise unlawful."

So far as concerns the matter of justness and reasonableness (the Section 1 issue), the plaintiff pointed out that, while the Commission had made various findings concerning the transportation characteristics of furniture, such as that furniture has particular *average* value, density, and bulk and that its movement is, on the *average*, in certain quantities and for certain distances, the Commission at no time erected any bridges over which rational human beings

could pass from these findings to the Commission's ultimate conclusion of reasonableness of the classification ratings which it permitted to become effective. Thus, as the plaintiff demonstrated to the Court, the Commission in no way indicated why commodities having the average characteristics referred to might reasonably be charged what the railroad respondents proposed to exact through their new and vastly increased ratings and, *a fortiori*, why those *average* characteristics justified the railroads in charging on *certain types* of furniture first class rates and on *other types* of furniture 1½, 1¾ and even 2 times such first class rates, particularly in view of the fact that, *for twenty years, all assembled furniture* has moved, in less-than-carload lots, on first class rates, and *all knocked-down furniture* has moved on 85% of such first class rates.

The plaintiff further pointed out that the Commission's report not only does not contain cost-of-service findings which support its ultimate conclusion, but also that the report affirmatively shows, and the Commission actually finds, that the cost evidence before it was so inconclusive that the Commission *could not even find the former exceptions ratings to be non-compensatory*, and that the Commission *accordingly could not find justification, in such evidence, for the tremendous increases* (averaging between 58% and 76% and reaching 100% in many instances) *inherent in the classification ratings which it approved.*

Plaintiff further called to the attention of the Court the fact that, in classification "reasonableness" proceedings, the customary basic and subsidiary findings (and the *essential* findings in such proceedings, according to repeated Commission expressions, as well as statements of leading writers in the field) are findings of comparison, namely, findings that other commodities (comparable from a transportation point of view) are customarily charged the same

rates, and that, in view of the absence of adequate cost findings, such findings, and such findings alone, could give validity to the Commission's findings that furniture has the transportation characteristics which warrant the proposed ratings. The Commission's report will, the plaintiff pointed out, be searched in vain for any findings of this essential type, unless the Commission's reference to its 1931 decision in the so-called *Furniture*[2] proceedings is intended as such a finding, and if it is so intended the finding does not provide support for the Commission's ultimate conclusion. The particular finding is,

> "The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra,* and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis."

In demonstrating to the Court (and the Court apparently accepted the plaintiff's contention in this regard for it completely ignored the decision in the *Furniture* proceeding in its opinion) that this finding affords no support for the Commission's ultimate conclusion, the plaintiff first called attention to the fact that none of the non-furniture items involved in this proceeding were included in the *Furniture* investigation, that there is accordingly no direct relationship between the earlier proceeding and the non-furniture items in this proceeding and that no indirect tie exists, because the Commission has made no finding, and there is no evidence, that the non-furniture items involved in the current proceedings are comparable, from a transportation standpoint, with furniture. The plaintiff further pointed out that the earlier *Furniture* decision provides no proper basis whatsoever for the Commission's conclusions relative

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[2] *Rate Structure Investigation, Part 5, Furniture,* 177 I. C. C. 5 (1931) referred to in the Commission's report, and herein, as *Furniture.*

to the present classification ratings even on furniture, for the reason that the evidence of record shows that the less-than-carload recommendations made in the original *Furniture* proceeding were discredited from the very outset, that the Commission reopened the proceeding for the specific purpose of reconsidering such recommendations (and ultimately closed the proceeding without further action only because the carriers had adopted the present exceptions ratings and rendered the issue moot), and that even if the recommendations had had original validity, changes in circumstances directly bearing upon the correctness of those 1931 ratings would, in the intervening *20-year period*, have made the recommendations obsolete and products of an entirely different economic era. In fact, the evidence underlying the *Furniture* proceeding decision would not even be admissible in this or any other proceeding today because of the staleness thereof (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248 (1932)).

So far as concerns the matter of undue discrimination (the Section 2 issue), the plaintiff demonstrated to the Court that shippers had established, before the Commission, a *prima facie* case of Section 2 violations by showing that under the challenged classification ratings *identical items of furniture carry different ratings* and consequently pay different rates *depending upon their intended use*, and also that many items of furniture, so substantially similar as to be entitled to equal treatment pursuant to Section 2, are assigned different ratings and accordingly afforded unequal treatment. Typical illustrations were cited to the Court, including the case of furniture which, if the same article were sold as a vanity base, would move on a first class rate but, if sold as a desk, would be charged fifty per cent more, or 1½ times such first class rate. A further illustration indicated that, under the classification ratings approved by

the Commission, an overstuffed sofa is assigned a first class rating, whereas its *matching counterpart*, an overstuffed chair, must be charged *1¾* times such first class rate, *notwithstanding the fact that the two pieces have virtualy the same density and value characteristics*, and obviously are identical in all transportation characteristics relating to movement and handling, since they almost invariably are sold and shipped in sets. The plaintiff further pointed out to the Court that the Commission's report is utterly silent with respect to the Section 2 violations to which its attention had been so specifically directed, and that accordingly it is impossible to contend that the Commission has made adequate particular findings or, in fact, any particular findings to support its conclusion that the classification ratings are not unlawful in so far as that conclusion purports to bear upon the Section 2 issue.

So far as concerns the matter of undue preference and prejudice (the Section 3 issue), the plaintiff, as in the case of the Section 2 issue, demonstrated to the Court that shippers appearing before the Commission had established a *prima facie* case of Section 3 violations by showing that, in many instances, following establishment of the new high classification ratings within Official Territory and on interterritorial shipments to and from Official Territory, particular shippers would be placed at a substantial rate disadvantage in attempting to compete with other shippers shipping their freight under similar circumstances, and that the same carrier or carriers would be parties to the arrangement giving rise to such unequal treatment. The plaintiff further pointed out that, while the Commission's ultimate conclusion of lawfulness dealt with the matter of unlawfulness under Section 3, the only subsidiary findings of the Commission with respect to the Section 3 issue were the negative finding that,

> "As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice",

and the obscure finding that

> "There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice",

and that neither of these findings could properly support the Commission's ultimate conclusion relative to Section 3 lawfulness. Both findings involved and rested upon errors of law. In the case of the above first quoted finding, the burden of proof requirements of Section 15(7) of the Interstate Commerce Act were ignored and, in the case of the above second quoted finding, the law as recently stated by the United States Supreme Court in *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573 (1948) with respect to a carrier's responsibility for participation in an unduly preferential and prejudicial rate adjustment was disregarded. As a consequence, as the plaintiff pointed out, the Commission's ultimate conclusion of lawfulness with respect to Section 3 was clearly without support of an adequate subsidiary finding.

The plaintiff further demonstrated to the Court that the evidence before the Commission wholly failed to support its ultimate conclusion. Thus, in analyzing for the Court the evidence in the proceeding, the plaintiff was able to find evidence supportive of most of the findings which the Commission made with respect to certain *average* characteristics of furniture from a transportation standpoint, but wholly unable to find any evidence which would instill meaning into those findings, or which would develop any relationship between the characteristics so found and even the general

level of the classification ratings, let alone the particular ratings proposed for particular furniture items. Thus, even if the Commission had made adequate cost findings and there were evidence to support the same, there was clearly no evidence whatsoever with respect to *reasonably anticipated revenue under the proposed ratings*, which evidence is obviously necessary to relate the cost evidence to the issue of the reasonableness of the proposed ratings. As the plaintiff effectively demonstrated to the Court, there plainly was no evidence before the Commission from which the Court, even if it were proper for it to do so, could infer or supply the missing adequate subsidiary findings which are essential to the validity of the Commission's ultimate conclusion, and hence its order.

The plaintiff, on the basis of the foregoing, urged that an injunction be issued and further pointed out to the Court that, contrary to the contentions of the railroad respondents, individual shippers who had been and would be subjected to overcharges, discrimination and undue prejudice under the classification ratings schedule would be unable to obtain reparations relief therefor if the Commission's present order approving the classification ratings were permitted to stand. In this connection the plaintiff referred to the decision of the United States Supreme Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1931) and to the rationale thereof that carriers are entitled to rely upon findings of the Commission in proceedings unappealed and unreversed to which they are parties, and that the Commission, having made a finding of reasonableness,

> "may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now

holds it should have decided in the earlier proceeding to be a reasonable rate." (P. 390.)

The Rulings Below

The Court properly summarized the governing rule of law with respect to the adequacy of Commission *findings*. Thus, the rule is correctly stated as requiring

> "that the report of the Commission must contain sufficient basic or subsidiary findings of fact, (which ought to be clearly stated and identified as such so that a reviewing court will not be groping in the dark for the grounds of the Commission's ultimate conclusion) to warrant the reviewing court in concluding that the Commission had rational grounds for . . . (its decision)."

The Court's purported application thereof in this proceeding, however, if sustained, would, in practical effect, nullify and abrogate that rule. The Court concluded that an examination of the Commission's report in the instant case "shows that it lived up to the rule." In support of this the Court said, with respect to the matter of "reasonableness" under Section 1 of the Act, that "well over a dozen subsidiary findings were made." These are the findings which the plaintiff concedes were made, but which the plaintiff submits are meaningless unless and until they are (as they cannot be) in some way related to the ratings in issue. The Court makes no effort to relate the findings to the Commission's ultimate conclusion of reasonableness, and it appears not to be concerned at the Commission's failure to indicate the relationship. Moreover, although the Court appears to recognize[3] that some form of rate com-

[3] As indeed the Court must in view of the inadequacy of the cost findings (see page 7 hereof) and the absence of any evidence as to anticipated traffic and revenue under the proposed ratings to enable it to relate the cost findings (if they had been adequate) to the ratings in issue (see pages 11 and 12 hereof).

parative process is essential (see pages 7-9 hereof for summary of plaintiff's contentions in this regard), the Court is apparently willing to allow that part of the administrative process to become a mysterious rite, beyond the Court's supervision, and the requirements of evidence. Thus, the Court in effect says that it will "*assume*" that the Commission bridged the gap between "furniture has certain characteristics" and "furniture may properly be charged particular rates" and that it will not insist either that the Commission say that the gap is bridged or reveal the general technique, if any, which was employed in bridging the gap. Such is the apparent intendment of the Court's curious statement that,

> "Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity even though it may say nothing as to the rate scale at large."

This language is, of course, directly in conflict with the oft-stated rule that administrative agencies must decide cases on the basis of the evidence before them and not on the basis of other facts "conceivably known by them." *Erie R. Co.* v. *U. S. (supra).*

So far as concerns the Section 2 and Section 3 issues, the Court not only wholly ignores the absence of any subsidiary finding bearing upon the matter of discrimination in violation of Section 2 (see pages 9 and 10 hereof), it further ignores the error as to burden of proof and the erroneous application of the "rate participation" doctrine, respectively, underlying the two subsidiary findings (see page 11 hereof) with respect to undue preference and prejudice in violation of Section 3.

Nor does the Court rely upon the *evidence* to supply the

omissions to which the plaintiff has so consistently referred. Although the Court refers to the record as voluminous, saying that

> "To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the 'begat' chapters of the Book of Numbers.",

the Court does not find, as indeed it could not find, that the evidence supports the Commission's ultimate conclusion. The Court's statement with respect to the evidence is that the

> "records before the Commission disclose adequate evidence, although some of it is typical or representative, to be sure, *to support the subsidiary findings made.*" (Emphasis supplied.)

This statement is meaningless, however, in view of the obvious inadequacy, hereinbefore pointed out, of "*the subsidiary findings made.*" Thus, we find, in connection with the Section 2 issue of discrimination, no "*subsidiary findings made*" whatsoever. In the case of the Section 3 issue of undue preference and prejudice, the report contains two "*subsidiary findings made*" but both are erroneous as a matter of law, and accordingly lend no support to the Commission's ultimate conclusion of lawfulness, so that inquiry as to whether such "*findings made*" are supported by evidence is a mere academic excursion. So far as concerns the issue of reasonableness under Section 1, the "*subsidiary findings made*" with respect to certain average transportation characteristics of furniture are, as plaintiff concedes, supported by evidence, but there are no "*subsidiary findings made*" to bridge the gap between such findings and the Commission's ultimate conclusion that the classification ratings are reasonable, and there is no evidence whatsoever

upon which such "bridge" findings could have been based. The Court, in effect, frankly so concedes when after "a careful examination" of the record it is forced to say that it only "assumes" that the Commission had available to it some means of bridging the gap. So also, in the case of the cost evidence, the Court apparently concedes the lack of any relating evidence. Thus, if the Commission's statement near the end of its report to the effect that "the classification ratings will do no more than compensate the carriers" can be regarded as a "subsidiary finding made" (and it seems to the plaintiff incredible that it could be in view of the Commission's immediately preceding finding that the cost evidence is so inclusive as only to create doubts concerning the compensatory nature of the *much lower* exceptions ratings), such "finding" is not, and cannot be, on the record before the Commission, related to the classification ratings in issue, because there was offered no evidence whatsoever relating to the probable volume and nature of traffic movement to be anticipated under the new ratings. It may well be that, as the Court says,

> "The process of rate making involves the weighing of imponderables, the making of predictions as to future traffic, and presumptive reasoning from available data."

Such "weighing", "predicting", and "reasoning", however, are, under due process of law, required to be based upon evidence of record. There was no evidence to which the Commission could direct its attention and energies in this regard, and the omission is not to be overlooked so casually as the Court does when it says,

> "Who can tell in advance, for instance, how much traffic will move by rail and how much will be diverted to trucks by the higher rates?"

The problem may not be easy of solution, but the duty of a carrier proposing a change in rates is, under Section 15(7) of the Act, to introduce evidence which the Commission can evaluate in endeavoring to make a reasonable prediction. When, as here, no evidence is offered, the carriers' cause must fail.

The Questions Involved Are Substantial

The questions presented by this appeal are substantial and of far-reaching importance. From the standpoint of the general public interest, the issues herein raised as to whether judicial review of administrative action is to be so narrowed as virtually to become a nullity are of great significance. From the standpoint of the direct and immediate interest which the plaintiff and the many others whom it represents have in the maintenance of reasonable and nondiscriminatory freight rates, the issues are also of very substantial importance.

So far as concerns the preservation of judicial review of administrative action, the Court's decision herein will determine, we submit, whether an appellant must anticipate a virtual refusal by a reviewing court to go beyond the ultimate conclusions of the agency in an appeal proceeding challenging a report and order of the Commission. The rulings of the Court in the instant case, as hereinbefore pointed out, manifest an extremely restrictive attitude towards judicial review which comes dangerously close to complete abrogation of that function.

Thus, the plaintiff's charge that the Commission had failed to make adequate subsidiary findings to support its ultimate conclusion was brushed aside by the Court with the assertion that "typical or representative findings resting upon typical or representative evidence" were made by the

Commission, and that these were sufficient, without any discussion of the plaintiff's plainly demonstrated contentions that the "typical and representative findings" referred to in no way bear upon the issues of Section 2 and Section 3 unlawfulness, concerning which the plaintiff established *prima facie* cases of violation before the Commission, and are, without additional findings supported by substantial evidence, clearly irrelevant to, and of no assistance in, determining whether the Commission correctly decided that the new and greatly increased freight ratings are just and reasonable. It is true that "typical or representative findings" are all that are required, but this means merely that, if the Commission had found, based on substantial evidence, and with respect *to a representative cross section of all the furniture and non-furniture items involved herein*, that the new, higher freight ratings were necessary to assure a reasonable margin of profit, or that the proposed ratings would be no higher than those presently in effect on other articles having substantially similar transportation characteristics, it would then be unreasonable to require findings, based on equally convincing proof, of the same facts for each of the furniture and non-furniture items included in the new schedules. The "typical and representative findings" rule is thus but a refinement of the rule for testing the adequacy of Commission findings, and is by no means a substantive substitute for the basic rule of judicial review. The "typical and representative findings" which are required must still relate to and *support* the Commission's ultimate conclusion. Findings which relate to a Section 1 issue may not just be "assumed" to be supportive of the Section 1 conclusion, nor may findings which relate only to a Section 1 issue be used to buttress Section 2 and Section 3 conclusions, which are otherwise wholly without support.

The Court's reluctance in the instant case to interfere in any way with the Commission's obviously invalid order is, of course, regrettable, and the unfortunate situation in which furniture shippers find themselves is not alleviated by the presence of any readily available alternative remedial process. Thus, although the Court states in its opinion that,

> "if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materializes, remedial process is readily at hand under the Act" (P. 15),

the fact is that if the Commission's affirmative ultimate conclusion in this case that the classification ratings "are just and reasonable and not otherwise unlawful" is upheld as proper, later collateral attack upon such ratings by an individual shipper would be precluded. *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 381. As the Court there said, the Commission, having made a finding as to reasonableness,

> "may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate" (P. 390).

In this connection, the case of *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671 (1943), in which rate attack was permitted, is plainly distinguishable. In that case, the Commission had made no finding that the rates were just and reasonable and not otherwise unlawful. On the contrary, its seal of approval had been expressly withheld and the Court specifically called attention

to the fact that the issue of undue preference and prejudice was thus left open by the original decision of the Commission. In the instant case, on the other hand, there are affirmative findings of reasonableness and of freedom from other unlawfulness, and the principle stated in the case of *Arizona Grocery Co.* is accordingly applicable.

That the issues herein are substantial because of their major and immediate importance to the furniture industry throughout the country is obvious from the facts of record with respect to the nature and character of that industry. The Commission has found that "the furniture industry is one of the largest of the consumer durable-goods industries." As the Commission has also found, however, the industry is composed principally of small manufacturers, most of whom do not individually make complete lines of all types of furniture, or run their lines through the entire range of values and quantities. Moreover, so far as concerns marketing, the industry is one of small retailers, with relatively few wholesalers. Two circumstances, important because of their direct bearing on this proceeding, follow from the above-described nature of the industry. The first is that because the industry consists largely of small manufacturers and small retailers, *less-than-carload rates* are of tremendous concern to it. The Commission has found that of all shipments of furniture from points in Official Territory in 1948, 80% were less-than-carload shipments. The second circumstance is that most furniture manufacturers cannot market their particular products solely in their immediate vicinities and are therefore dependent on shipping their products substantial distances. Because of these two circumstances, the furniture industry is, of necessity, vitally affected by increases in freight rates on less-than-carload shipments within, from, and to Official Territory, such as those proposed by the carriers in the

instant case. The economic future of a large part of the furniture industry is dependent upon the outcome of this proceeding.

Respectfully submitted,

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APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 5677 [4]

FURNITURE, L.C.L., FROM, TO AND BETWEEN THE EAST

Submitted October 24, 1950. Decided November 20, 1950

Proposed Increased Less-than-carload Ratings on Furniture and Related Articles Between Points in Official and Illinois Territories, and Between Points Within Those Territories and Points in Southern, Western Trunkline, and Southwestern Territories, Found Just and Reasonable, and Not Otherwise Unlawful. Orders of Suspension Vacated, and Proceedings Discontinued.

Francis L. Brown, Leo P. Day, Guernsey Orcutt, and William B. Johnson for respondents.

R. F. Bohman, J. T. Ryan, Leonard Mongeon, W. G. Burnette, Stephen P. Dunn, T. H. Burgess, H. R. Fritz, Harry B. Spamer, Hyman I. Fischbach, Robert DeKroyft, and Leslie LaCroix for protestants.

REPORT OF THE COMMISSION

Division 3, Commissioners Rogers, Patterson, and Johnson

By DIVISION 3:

Exceptions were filed by the protestants to the report proposed by the examiner, to which the respondents replied, and the issues have been argued orally. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given due consideration and found not justified.

By schedules filed to become effective on July 15, 1949,

[4] This report also embraces Investigation and Suspension Docket No. 5694 Furniture, L.C.L. From Or To Illinois Territory, and Investigation and Suspension Docket No. 5832, Furniture, L.C.L. From Or To Illinois Territory.

and later dates the respondents, the principal rail carriers operating within official and Illinois territories, proposed cancellation of exceptions ratings on furniture and related articles, in less than carloads, between points in official and [5] Illinois Territories and also between points in those territories and points in southern, western trunk-line, and southwestern territories. Upon protest of various individuals and organizations representing the furniture industry in official, southern, western trunk-line, and southwestern territories, the effective dates of the schedules were suspended until February 14, 1950, and later dates, and they have since been voluntarily postponed by the respondents pending disposition of the proceedings.

The furniture industry is one of the largest of the consumer durable-goods industries. It is made up largely of small manufactures, located in relatively small cities or towns, and retail distributors. There are relatively few wholesale distributors of furniture. The bulk of the rail movement is in less-than-carload quantities.

In furniture production and the marketing thereof official territory is the most important region in the country. The production in that territory was 66 percent of all furniture produced in the United States in 1947, and sales were 53 percent of the total sales by all furniture stores of the country in 1948.

The ratios of less-than-carload shipments of furniture to all shipments of furniture by rail during 1948 were as follows: Between points in official territory, 80.4 percent; from points in official territory to destinations in all territories, 77.9 percent; and from origins in southern territory to points in official territory, 45.5 percent. The less-than-carload movement from official territory to western territory comprised 25.3 percent of the total movement from official territory to all territories.

The exceptions ratings, which would be cancelled by the suspended schedules, generally provide for less-than-carload ratings of first class on furniture shipped set up and second class on knocked-down shipments. Since the classi-

[5] Following the usual practice all of Illinois territory will be treated as part of official territory.

fication provides for ratings as high as double first class for many items of furniture in less-than-carloads, the exceptions produce a basis of rates substantially lower than the classification basis which would apply in the absence of the exceptions.

The exceptions ratings were established in 1932 to enable the respondents to meet the then unregulated motor-carrier competition and to give financial assistance to the furniture industry during the economic depression of 1930-1939. The record indicates that more than 40 percent of the furniture produced and marketed in official territory is now transported by trucks, and in 1948 the furniture industry was in better financial condition than at any time during the last 20 years.

The classification ratings, which will apply if the suspended schedules become effective, stem from the Commission's findings in Furniture, 177 I. C. C. 5, a nationwide investigation of all rates on furniture and related articles, decided July 28, 1931. In dealing with the issues pertaining to less-than-carload traffic, the Commission found, at pages 116-117, that maximum reasonable less-than-carload ratings, in the three major classifications, on furniture and related articles having individual values ranging from 15 to 25 cents per pound would be those which substantially conform to the following table of grouped weights per cubic foot:

3 pounds and under	3 times first
Over 3 pounds and including 3.75 pounds	2½ times first
Over 3.75 pounds and including 4.75 pounds	2 times first
Over 4.75 pounds and including 5.75 pounds	1¾ times first
Over 5.75 pounds and including 7.25 pounds	1½ times first
Over 7.25 pounds and including 9.50 pounds	1¼ times first
Over 9.50 pounds and including 12.50 pounds	First
Over 12.50 pounds	Second

Pursuant to the findings and order therein entered, the respondents,[6] effective February 25, 1932, established revised classification ratings determined according to the prescribed table of weight densities, and at the same time they canceled then-existing exceptions ratings and commodity rates on furniture in less-than-carloads. Following

[6] Other carriers took similar action.

conferences between carrier and shipper representatives, the carriers, in February 1933, adopted the following table of weight densities with reduced ratings, as a substitute for the one prescribed:

3 lbs. and under	D1
Over 3 lbs. and including 4 lbs.	1¾
Over 4 lbs. and including 5 lbs.	1½
Over 5 lbs. and including 6½ lbs.	1¼
Over 6½ lbs. and including 9½ lbs.	1
Over 9½ lbs.	2

Reduced classification ratings based upon this table were established in May 1933, and, as clarified and further reduced on December 31, 1940, they are still in effect. As is apparent, the present, or proposed classification ratings are substantially lower than the bases prescribed in *Furniture, supra.* The furniture on which they would apply (in the absence of exceptions) is of much higher value than that contemplated by the findings in that proceeding. In October 1949, furniture shipped from official territory origins to New York, N. Y., and Philadelphia, Pa., ranged in invoice value from 40 to 50 cents per pound, and that from southern origins to the same points varied from 29 to 34 cents per pound. During the same month, the freight charges on less-than-carload furniture shipped to New York and Philadelphia varied from 4.8 to 9 percent of the invoice value of the traffic.

The classification and the exceptions provide for less-than-carload ratings on 367 items of furniture. Of these, the suspended schedules would increase the ratings on 151, identical ratings being provided in both the classification and the exceptions for the remaining 216 items. The articles on which the increases would apply move in relatively large volume and the changes in ratings do not fully reveal the changes in actual rates that would be brought about by the suspended schedules. Due to the requirements of the class rate revision of 1939, exceptions-rated traffic transported within official territory is subject to basic class rates 10 percent lower than the scale applicable on classification-rated traffic, while the reverse of this is true on interterritorial movements to and from official territory. On such movements, exceptions-rated traffic is in most in-

stances subject to rates 10 percent higher than those on classification-rated traffic. It follows, therefore, that on traffic rated first class in both the classification and the exceptions, the suspended schedules would increase the rates within official territory by 10 percent and reduce many of those to and from that territory by the same percentage.

The less-than-carload ratings prescribed in *Furniture supra*, the present classification ratings, which are those proposed for the future, and the presently-applicable exceptions ratings, together with the average weights per cubic foot, on several articles of furniture, are shown in the following table, compiled from the respondents' exhibits of record:

RATINGS

Article	Average weight per cubic foot Pounds	Prescribed in *Furniture*, 177 I. C. C. 5	Under Present classification	Under exceptions
Beds, knocked down	7.68	1¼x1	1	2
Benches, set up	3.43	2½x1	1	1
Buffets, set up	6.08	1½x1	1	1
Chests, set up	6.23	1½x1	1	1
Chairs, set up	4.03	2 x1	1¾x1	1
Sofas, set up	3.86	2 x1	1½x1	1
Cots, folded	4.58	2 x1	1¼x1	1
Desks, steel, set up	8.10	1¼x1	1	2
Tables, steel, set up	4.59	2 x1	1¼x1	2
Mattresses, set up	4.00	2 x1	1½x1	1

According to the protestants, the average weights per cubic foot, or the weight densities, of the several articles are not accurately disclosed by the figures shown because they do not reflect representative movements. For example, the weight density shown for buffets was determined by the weights and measurements of 17 pieces made by 16 manufacturers, whereas there are more than 600 producers of buffets in the United States. As has been seen, a large percentage of the total movement of furniture in less than carloads is transported by truck. In any event, a lack of accuracy in the figures relating to weight densities would not seriously impair the value of the comparisons because (1) the present classification ratings are materially lower than those prescribed in *Furniture, supra*, for practically

all weight groups, and (2) the exceptions ratings which would be affected by the suspended schedules were largely determined without regard to weight density.

The respondents insist that most of the more desirable articles of furniture are now being transported by truck, largely by motor carriers specializing in the transportation of furniture. They claim that the furniture transported by rail within and to and from official territory consists of small shipments made up of light, bulky, fragile articles which are extremely difficult to transport without serious damage.

To develop pertinent transportation characteristics of less-than-carload furniture shipments, the respondents made a study of all less-than-carload furniture traffic received by each one of the 10 carriers listed in the footnote [7] during one day in August 1949. Some of the results of the study are shown in the table below:

Origin territory	Number of shipments	Average weight per shipment Pounds	Average revenue per shipment	Weighted average haul in official territory Miles	Average revenue accruing to official-territory carriers
Official	1,333	243	$ 4.60	385	$ 4.60
Southern	253	271	7.33	300	3.06
Western trunkline	7	153	4.45	394	2.34
Southwestern	3	223	14.06	794	4.96

All of the above figures relate to shipments on which the suspended schedules would increase the ratings. The revenue figures reflect the rates in effect in August 1949, and do not include the general increases which became effective on September 1 of that year. It will be noted that the average weight of the shipments was less than 300 pounds and the weighted-average haul more than 300 miles.

According to the respondents, furniture, especially that

[7] The Baltimore and Ohio Railroad Company; Boston and Maine Railroad; The Chesapeake and Ohio Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Grand Trunk Western Railroad Company; The New York Central Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company; and Reading Company.

handled by rail carriers in official territory is more susceptible to damage in transit than any other commodity moving in volume in less-than-carload service. On February 1, 1948, the respondents established new rules, much more stringent than those in force prior thereto, to govern the packing of furniture for shipment. The new rules resulted in some reductions in the volume of damage claims, but it appears that less-than-carload furniture shipments are still subject to important claims for damage in transit.

During August 1949, the carriers listed in the footnote collected $12,476,030 on all less-than-carload shipments, and their total claim payments on all such shipments aggregated $898,820, or 7.2 percent of the revenue on all less-than-carload traffic. During the same month, their total claim payments on less-carload furniture aggregated $207,620, or 23.1 percent of the total claim payments on all less-than-carload traffic and 1.7 percent of the total revenue on all less-than-carload shipments.

Respondents made a special study of damage to less-than-carload furniture at New York and Philadelphia during the two weeks beginning with October 17, 1949. The study was made by respondents' regular damage inspectors, in the course of routine inspections, for the purpose of obtaining the actual weight, invoice value, freight charges, and the estimated damage of each shipment. The study included 294 shipments, of which 252 originated in official territory, 141 in the South, and one in the West. Pertinent data from the study are shown in the following table.

	Data developed by inspections at New York, N. Y.	Philadelphia, Pa.
Total invoice value	$24,293.29	$22,576.35
Total freight charges	1,854.67	1,381.21
Total estimated damage	2,001.40	2,932.45
Percentage relation—damage to invoice value	8.24	12.99
Percentage relation—damage to freight charges	107.91	212.31

The figures do not pertain to all furniture shipments inspected during the study period. They relate only to those shipments on which the invoice value and freight bill information were available at the time of inspection. The damage figures reflect conservative estimates. The evidence

suggests that the actual claim payments will probably exceed the estimated damages.

The claim payments for visible and concealed damage on all less-than-carload traffic and less-than-carload furniture assumed by (a) all class I carriers and (b) the 10 official-territory carriers listed in the footnote during the period 1944-1948 were as follows:

Year	All class I carriers		Official-territory carriers	
	All less-than carload traffic	Less-than-carload furniture	All less-than carload traffic	Less-than-carload furniture
1944	$12,749,701	$3,457,288	$6,513,119	$1,624,543
1945	16,067,283	4,355,922	8,352,011	1,947,104
1946	19,976,113	5,004,024	[a]9,603,084	[a]2,310,471
1947	27,776,239	8,171,436	13,862,922	3,792,977
1948	26,373,562	8,249,160	12,171,447	3,721,203

[a] Payments by the Delaware, Lackawanna & Western were not included for the period July to December 1946.

The above amounts do not include payments for damages caused by theft, wreck, fire, and carrier negligence. The percentage relationships of damage claim payments on less-than-carload furniture to the total damage payments on all less-than-carload traffic during the same period are shown below:

For the year	For all class I carriers Per cent	For the 10 official-territory carriers Per cent
1944	27.1	24.9
1945	27.1	23.3
1946	25.2	24.1
1947	29.4	27.4
1948	31.3	30.6

On traffic originating on and after January 1, 1948, the claims paid by the Pennsylvania during the first 9 months of 1949 for visible and concealed damages on less-than-carload furniture were 30.8 percent of similar claims paid by the same carrier during the same period on all less-than-carload traffic. With the exception of shipments originating during January, this computation relates to furniture packed after the revised packing requirements became effective. The fact that this percentage is a trifle higher than the corresponding figure for 1948 does not negative the

fact that the revised requirements brought about some improvement in the claims situation.

The respondents contend that the revenue accruing to them from both intraterritorial and interterritorial shipments of less-than-carload furniture is substantially less than the cost of the service. To support their contentions in this respect, they introduced evidence designed to show (a) that the revenue which they receive from all less-than-carload traffic is materially less than the cost of the service, and (b) that the cost of handling less-than-carload furniture is substantially greater than the average cost of handling all less-than-carload traffic.

For January 1949, the respondents show that the cost to the 10 carriers shown in the footnote, excluding the Chesapeake & Ohio, for handling all less-than-carload traffic was materially in excess of 70 percent of the first-class rates, or the weighted-average rate on all less-than-carload traffic within and to and from official territory in January 1949, the spreads between cost and revenue being much greater for the longer than for the shorter hauls. The study was based on a cost formula approved in previous decisions, a less-than-carload weight of 13,320 pounds, and a return of 6 percent. In 1948, the 9 carriers included in the study received 76.8 of the less-than-carload revenue accruing to all class I carriers in official territory.

The study is strongly supported by the decision in *Class Rate Investigation, 1939*, 262 I.C.C. 447, wherein the Commission found, at page 591:

> "Less-than-carload traffic, as a whole, is carried at a deficit in all territories, except possibly in the South."

On page 697 of the same report appears this statement:

> "The railroads generally load and unload less-than-carload traffic * * *. One of the results of this method of handling less-than-carload shipments, however, is to mix freight of different classes in the same railroad car for transportation purposes, so that the costs are generally a composite of all classes of less-than-carload freight rather than a separately ascertainable figure for each commodity. The weighted-average rate is, therefore, the best criterion for judging

the sufficiency of the less-than-carload rates in the light of the costs. Such an analysis unmistakably reveals the fact that less-than-carload traffic generally in all the territories is not bearing its proper share of the costs of transportation—in fact, excluding wartime loading it is not yielding on the average, its out-of-pocket costs plus constant expenses solely related to this traffic, plus the cost of collection and delivery, in any territory except possibly in the southern where the margin of difference between revenues and these expenses is slight."

Respondents' contention that the cost of transporting furniture is substantially higher than the cost of transporting less-than-carload traffic as a whole is based to a large extent upon the light and bulky character of the traffic. Due to these characteristics, a shipment of furniture weighing very little occupies a large amount of space, and a capacity load of furniture placed on hand trucks or mechanized freight-moving equipment on station platforms, on delivery trucks, or in freight cars weighs substantially less than similar loads of the heavier-density articles which move in less-than-carload service. Since the expense of operating a unit of station equipment is practically constant, the cost per unit of weight of handling furniture is substantially higher than the cost of handling heavier and less bulky articles. The results of a study of station handling costs at several Pennsylvania Railroad stations prior to September 1, 1949, are shown below:

	Number of Shipments	Weight Pounds	Cost per net ton of handling less-than-carload furniture	Average cost per net ton of handling less-than-carload traffic as a whole
Williamsport, Pa.	5	3,926	$3.13	$1.44
South Philadelphia, Pa.	5	4,945	2.11	1.35
Harrisburg, Pa.	5	5,564	2.81	1.68
Pitcairn Transfer, Pa.	5	8,460	3.48	1.59
Pittsburgh (11th St.), Pa.	5	1,265	1.74	1.61
Buffalo, N. Y.	5	1,347	1.14	.94
Chicago, Ill.				
Originated traffic	5	2,434	4.64	2.27
Terminated traffic	5	3,364	4.38	2.27
Transfer traffic	5	2,826	4.15	2.27

The traffic study of August 1949, made by the respondents, to which reference has been made, includes 1,333 intra-territorial shipments of furniture terminated by the carriers shown in the footnote. Of these, the respondents selected 133 shipments as representative of the traffic in question for the subject of a study designed to show the cost of transporting less-than-carload furniture in official territory. To illustrate, on a shipment of chairs, weighing 320 pounds, from Cincinnati, Ohio to Alton, Ill., 339 miles, the following costs were developed: Allowance in lieu of collection or pick-up service, 16 cents; origin platform service, 29 cents; origin clerical service, 32 cents; delivery service, 46 cents; destination platform service, 23 cents; destination clerical service, 62 cents; line-haul service, $2.32; claim payments, $1.67; total cost, $6.07. The revenue collected was $5.57, the cost exceeding the revenue by 50 cents. On the basis of similar data relating to the remaining 132 shipments, the costs are shown as 113 percent of the revenues. Another study relating to 23 shipments from southern and western trunk-line territories to official territory, limited to costs assumed and revenues received by the official-territory carriers, indicates that the respondents' expenses were about 111 percent of their revenues from those shipments.

All cost items included in the studies, except claim payments, are based on the averages for less-than-carload traffic as a whole and do not reflect the actual cost of handling light and bulky furniture. The cost elements do not include the increases resulting from the 40-hour week which became effective on September 1, 1949, and the revenue figures do not include the general increases in rates which became effective on the same date. Under the general rate increase, respondents' rates were increased by about 4 percent, while the 40-hour week increased the less-than-carload terminal expenses of the Pennsylvania and the Baltimore & Ohio by 17 and 16.2 percent, respectively. The costs are also understated because nothing was included for station maintenance, general supervision, overhead and administrative expenses, terminal switching, and interest on investment in terminal facilities.

The costs for claim payments are based upon 73.5 percent of the claim cost incurred by the Pennsylvania for each one dollar of revenue received by that carrier on less-than-carload furniture during March 1949. Free pick-up and delivery service is not maintained at all stations in official territory, especially in New England. However, free pick-up and delivery service is maintained at practically all of the large stations in this territory and the cost of that service was charged only against those shipments included in the study upon which pick-up and delivery service was actually performed. The protestants insist that the cost of the pick-up and delivery service is not a proper element of expense because the respondents may discontinue the service or establish a special charge for performing it. The respondents probably could not be required to perform this service, but the shippers use it and the expense involved in its performance contributes to the overall cost of transporting the traffic.

Most of the evidence presented by the respondents is criticized by the protestants on the grounds that it is not representative of the situation because it relates (a) to the operations of only a few carriers, and (b) to only a limited number of furniture items. Most of the respondents' evidence pertains to furniture that is representative of the movement by rail and to the performances of the 10 carriers listed in the footnote. They are the largest carriers serving official territory and they terminate or originate most of the traffic.

The protestants contend that it is unsound to rate furniture, which has a wide range in densities and values, in accordance with any graduated density table, because the densities and values overlap, and that the ratings should be determined according to whether the furniture is set-up or knocked-down as is reflected in the existing exceptions ratings. Weight density is an important factor in the construction of ratings because of its close relation to space occupancy. The protestants point out that the respondents' merchandise cars are transported partly empty, irrespective of whether the partial load consists of heavy-density traffic or light-density furniture. Fragile, light-density

traffic is frequently the cause for the movement of partly-loaded merchandise cars. Protestants' position is tantamount to a contention that commodity rates should apply on this traffic, which is contrary to the decision of the Commission in *Furniture, supra.*

Generally, the carriers serving the territories bordering on official territory are not parties to the suspended schedules. It follows that the suspended schedules would not increase the ratings from border points to certain destinations, and the protestants contend that this would result in undue prejudice and preference. For example, the exceptions ratings would be continued from producing points such as Chicago and Rockford, Ill., to certain destinations, while producers at such points as Grand Rapids, Mich., and Jamestown, N. Y., would be required to pay the higher classification ratings. If the suspended schedules should become effective the producers in official territory would be compelled to ship into southern, western trunk-line, and southwestern territories on the classification basis, while producers within those territories may ship to the same points on the lower exceptions basis. The protestants maintain that this would result in undue prejudice and preference. A difference in rates, or ratings, standing by itself, is not enough to establish undue prejudice and preference. There is no indication of competition, with effective control of the rates by a carrier or carriers, which could constitute support for a finding that ratings as proposed would subject shippers to undue prejudice.

On exceptions, protestants direct attention to the fact that certain respondents, especially those operating in Illinois, proposed cancellation of the exceptions ratings between all points in official territory, but did not propose cancellation of such ratings from and to all points on their lines in other territories, alleging that this would bring about departures from the fourth section. It appears that the respondents intended to cancel the exceptions ratings to and from all points on their lines, and after service of the proposed report additional schedules were filed proposing cancellation of some or all of the ratings referred to. These schedules were suspended in Investigation and Suspension

docket No. 5832 and will be disposed of by our decision herein.

The protestants also contend that the substantial increases in the spreads between the less-than-carload and the carload rates, which would be brought about if the suspended schedules became effective, would unduly prejudice small shippers and unduly prefer large shippers who ship in carload quantities. The record does not support this contention. The conclusion is warranted that no unreasonable relation to carload rates would result.

According to the protestants, the revised packing rules increased the cost of preparing furniture for shipment by about 26 percent, while the weight of the shipments, on which the freight charges are based, was increased by 10.8 percent. They assert that the additional revenue accruing to the respondents from the increase in shipping weights is more than enough to cover the cost of claim payments on the traffic. They state that they agreed to the revised packing rules and cooperated in their establishment with the implied understanding that there would then be no increases in the exceptions ratings.

As has been noted, a substantial portion of this traffic is handled by trucks. The protestants insist that practically all of the traffic now handled by the respondents will be diverted to motor carriers if the suspended schedules become effective. The packing requirements of the motor carriers are not as exacting as those of the rail carriers. In fact, some of the motor carriers, especially those specializing in the transportation of furniture, accept shipments without any packing or crating at all.

It is indicated that the furniture industry is not confronted with a seller's market. The protestants contend that it cannot absorb substantial increases in transportation charges. The suspended schedules would increase the rates per 100 pounds from 5.9 to 100 percent, the average increase being between 58.7 and 76.3 percent. The increases would be imposed upon rates that have been subjected to all the general increases authorized during and after 1946, and the protestants are fearful lest outstanding

findings in the class-rate revision of 1939 result in further increases in the ratings and the class rates.

Conclusions.—The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra,* and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice.

We find that the suspended schedules are just and reasonable, and not otherwise unlawful. An order will be entered vacating the orders of suspension and discontinuing the proceedings.

ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office in Washington, D. C., on the 20th Day of November, A. D. 1950

INVESTIGATION AND SUSPENSION DOCKET No. 5677
FURNITURE, L.C.L. FROM, TO AND BETWEEN THE EAST

INVESTIGATION AND SUSPENSION DOCKET No. 5694
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

INVESTIGATION AND SUSPENSION DOCKET No. 5832
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

It appearing, That by orders dated July 14, 1949, and later dates, the Commission entered upon an investigation concerning the lawfulness of the ratings, rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and suspended the operation of said schedules until February 14, 1950, and later dates, and that respondents subsequently postponed operation of the said schedules pending the disposition of the proceedings;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and has found that the suspended schedules are just and reasonable:

It is ordered, That the orders heretofore entered in this proceeding, suspending the operation of said schedules, be, and they are hereby, vacated and set aside as of December 11, 1950, and that these proceedings be discontinued.

By the Commission, division 3.

W. P. Bartel,
Secretary.

[SEAL.]

APPENDIX "B"

ORDER

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 16th Day of March, A. D. 1951

INVESTIGATION AND SUSPENSION DOCKET No. 5677
FURNITURE, L.C.L. FROM, TO AND BETWEEN THE EAST

INVESTIGATION AND SUSPENSION DOCKET No. 5694
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

INVESTIGATION AND SUSPENSION DOCKET No. 5832
FURNITURE, L.C.L. FROM OR TO ILLINOIS TERRITORY

It appearing, That on November 20, 1950, Division 3 made and filed its report, and entered its order in the above-entitled proceedings vacating and setting aside at a specified date the orders heretofore entered in these proceedings suspending the operation of the schedules therein involved and discontinued the proceedings.

It further appearing, That the (1) Furniture Manufacturers Association of Grand Rapids; (2) National Furniture Traffic Conference, Inc.; (3) Lynchburg Traffic Bureau; and (4) National Retail Dry Goods Association, filed peti-

tions for reopening, further hearing, reargument, and reconsideration, and that the effective date of the said order of November 20, 1950, was postponed until further order of the Commission pending consideration and disposition of said petitions;

It further appearing, That said petitions were assigned for oral argument and that the Commission, on February 26, 1951, heard oral argument by the parties upon such petitions;

And it further appearing, That the grounds set forth in said petitions, and at such oral argument, in support thereof, do not constitute good and sufficient cause to warrant reopening the proceedings for further hearing, reargument, and reconsideration;

It is ordered, That said petitions be, and they are hereby, denied;

It is further ordered, That the said order of November 20, 1950, as subsequently modified, be, and it is hereby, further modified so as to become effective April 10, 1951.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX "C"

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 51-353

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., ET AL., *Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

Before Woodbury, Circuit Judge, and Sweeney and Ford, District Judges

OPINION OF THE COURT—September 5, 1951

WOODBURY, *Circuit Judge:*

In this suit under Chapter 157 of Title 28, U. S. C. to enjoin and set aside two orders of the Interstate Commerce Commission we are concerned with certain railroad rates on furniture, and related articles, moving in less than carload lots between points within Official and Illinois Territories,[8] and also to and from points within those territories and points in Southern,[9] Western Trunk Line,[10] and Southwestern Territories,[11] which the Commission in investiga-

[8] Illinois Territory is here treated in accordance with usual Commission practice as part of Official Territory, and Official Territory, generally speaking, lies east of the Mississippi and north of the Ohio and Potomac Rivers, and also includes most of Virginia.

[9] Southern Territory lies south of Official Territory and east of the Mississippi River.

[10] Western Trunk Line Territory is located approximately between Official Territory and the Rocky Mountains.

[11] Southwestern Territory lies south of Western Trunk Line Territory and west of the Mississippi River and also includes Arkansas, Texas, Oklahoma, and part of Louisiana. See *New York* v. *United States,* 331 U. S. 284, 291.

Another territory, Mountain Pacific, which includes Montana, New Mexico, and all territory west of the Rocky Mountains, is not involved in this proceeding.

tion and suspension proceedings found, "just and reasonable, and not otherwise unlawful." Two kinds of rates are here involved; Class rates, and Exception rates. Class rates rest upon a grouping of commodities by the railroads into classes, the commodities in each class paying the same rate per 100 pounds. One class is called first class, and the others are either a percentage or a multiple of first class. Thus freight classifications consist of lists containing descriptions of every commodity moving by freight, and the class, or perhaps classes, to which it is assigned, that is to say, its classification rating or ratings. Class rates, as described in footnote 2 on page 290 of the opinion in *New York* v. *United States*, cited in footnote 4, *supra*, "are in the form of a schedule which shows the price per 100 pounds for moving first-class freight every possible distance it may be moved. The cost of shipment for a given commodity is determined by ascertaining its classification rating, the first-class rate per 100 pounds for the haul involved, and the percentage of the first-class rate to which the classification rating in question is subject." Exception rates, as the name implies, result from the transfer of a commodity out of its regularly assigned class into another. See footnote 3, *id.*

In 1926 the Interstate Commerce Commission initiated a general nation-wide investigation of railroad freight rates on furniture, and related articles, which terminated in 1931 in a decision and order establishing class rates for the commodities considered. *Furniture*, 177 I. C. C. 5. These class rates, however, had hardly gone into effect when the railroads in 1932 at the behest of shippers established exception rates for some 151 furniture items when moving in less than carload lots. This action was taken for the twofold purpose of meeting then unregulated motor-carrier competition and to give financial assistance to the furniture industry during the depression. These exception rates, with modifications, have remained in effect ever since. Their abolition, with consequent automatic return to the class rates of 1931, which have twice been revised downward, is the matter with which we are concerned.

The principal rail carriers operating in Official Territory, as that term is used herein, by filing schedules with

the Commission which were to become effective on July 15, 1949, and on later dates, proposed cancellation of their exception rates on furniture moving in less than carload lots within the above territory, and to and from points in it and points in Southern, Western Trunk Line, and Southwestern Territories. Various individual shippers concerned, and organizations representing the furniture industry in the territories involved, protested to the Commission, and it, exercising the power conferred upon it by § 15(7) of Part I of the Interstate Commerce Act (49 U. S. C. § 15(7)) suspended the schedules until February 14, 1950, and later dates. Subsequently the schedules were voluntarily suspended by the railroads pending disposition of the Commission Proceeding.

Extended hearings were held in November, 1949, before an examiner for the Commission who, after submission of briefs, issued a proposed report which concluded with the recommendation:

> "The Commission should find that the suspended schedules are just and reasonable. An order should be entered vacating the orders of suspension and discontinuing these proceedings."

The shipper-protestants filed exceptions to this proposed report, the railroad-respondents replied, and oral argument followed before Division 3 of the Commission, which on November 20, 1950, entered a decision endorsing the examiner's recommendations. *Investigation and Suspension Docket No. 5677, Furniture Less Than Carload, From, To, and Between The East*, 279 I. C. C. 509. As its conclusions the Division said:

> "The exceptions ratings are far below the maximum basis prescribed in *Furniture, supra* [12] and the classification ratings, which would apply in the absence of exceptions ratings, are also substantially lower than the prescribed basis. The evidence relating to costs is not conclusive, but it gives rise to serious doubt as to whether sufficient revenue is derived from the excep-

[12] 177 I.C.C. 5.

tions basis to compensate for the cost of the service. From the evidence before us, we are convinced that the classification ratings proposed will not do more than compensate the respondents for the service performed on this traffic. As stated, the record is not persuasive that the ratings proposed will subject any shippers to undue prejudice.

"We find that the suspended schedules are just and reasonable, and not otherwise unlawful. An order will be entered vacating the orders of suspension and discontinuing the proceedings."

An order was accordingly entered on the same day vacating the suspension of the proposed schedules as of December 11, 1950, and the shippers thereupon filed petitions for reconsideration and further hearing by the entire Commission. The railroads' proposed schedules were further suspended pending consideration of these petitions, which were denied on March 16, 1951. Thereafter by successive orders the effective date of the order of November 20, 1950, was extended to April 25, 1951.

In the meantime on April 9, 1951, the plaintiff, National Furniture Traffic Conference, Inc., a Massachusetts Corporation having its principal office in the City of Gardner in that Commonwealth, filed its complaint in this court against the United States and the Interstate Commerce Commission asking for both a temporary and a permanent injunction restraining and suspending the operation and execution of the Commission's November 20, 1950 order putting the schedules proposed by the railroads into effect, and also its March 16, 1951 order denying the protestants' petitions for reconsideration and for further hearing by the entire Commission. This special three-judge court was thereupon duly convened pursuant to Title 28 U. S. C. § 2284 to hear the complaint. Our jurisdiction in the premises under Title 28 U. S. C. § 1336 is obvious.

The Furniture Manufacturers' Association of Grand Rapids, Michigan, a non-profit corporation of that State organized to promote and develop the furniture industry in Western Michigan, was granted leave to intervene as a

party plaintiff, and the Pennsylvania Railroad Company, and the other carriers by railroad in Official Territory who had been respondents in the Commission's proceedings, were granted leave to intervene as parties defendant. All parties have filed appropriate pleadings, and most of them have also filed briefs.

Judge Ford of this court on April 17, 1951, issued a temporary restraining order, and on April 27, 1951, the full court heard the parties on affidavits, briefs and oral arguments on the plaintiffs' application for an interlocutory injunction. A majority of this court as then constituted, (Judge McCarthy sat at the hearing on the application for a temporary injunction but was prevented by illness from sitting at the hearing on the application for a permanent injunction) denied interlocutory relief on the condition, which was complied with, that the railroad intervenors agree in writing, as they had orally at the hearing, to repay the shippers any freight charges which might subsequently be found to have been unlawfully collected. Judge Ford's temporary restraining order was thereupon revoked. The plaintiff, National Furniture Traffic Conference, Inc., then moved for summary judgment under Rule 56, F. R. C. P., and on June 8, last, the case came on for final hearing on that motion and on the application for a permanent injunction. The hearing was on the record before the Commission, which was introduced in evidence, affidavits, briefs and oral argument.

The motion for summary judgment is grounded upon the proposition that cancellation of the exception rates as proposed by the railroads would necessarily have the effect of restoring class rates on a variety of non-furniture items which were not considered in the 1931 *Furniture* case and as to the transportation characteristics of which no evidence was introduced and no findings were made by the Commission in the instant proceeding. It is said, to go into more detail, that the exception rates involved covered not only furniture, but also altogether different types of merchandise, such as clothes baskets or hampers, and store display racks and stands, classified specifically as such in the railroad classification ratings, and also baby and doll

carriages, gocarts and children's sulkies, classified by the railroads in their tariffs as "vehicles, other than motor", that although the classification ratings on furniture were approved by the Commission in its 1931 proceeding, the ratings on these other items were not because they appeared under other headings in the railroad lists, and that the record before the Commission in the proceeding here under consideration contained no evidence whatsoever with respect to the justness or reasonableness of the proposed classification ratings of the non-furniture items mentioned above. Wherefore it is contended that the Commission's order of November 20, 1950, is obviously arbitrary and capricious, and therefore bad in its entirety, and should be summarily set aside and enjoined.

It is strenuously urged that a motion for summary judgment is wholly inappropriate in cases such as this. But however this may be, it is certainly true that a summary judgment enjoining enforcement of an order of the Interstate Commerce Commission would be entered only in the clearest of cases, and this is definitely not in that category. Indeed it appears that the non-furniture items mentioned above were included in the exception rates of 1932 which the railroads now wish to cancel because of the insistence of spokesmen for the shippers that those items had the same transportation characteristics as furniture. And moreover, the railroads did put into the record statistical matter with respect to the non-furniture items showing their similarity to furniture as far as transportation is concerned. It is true that the Commission made no specific subsidiary findings with respect to the non-furniture items, but in our view that is not necessarily fatal to the order as will appear from our discussion to follow. For the present it will suffice to say that we see no merit in the motion for summary judgment and that it will be denied.

The basic contentions of both plaintiffs center around the Commission's ultimate conclusion that the proposed schedules of the railroads cancelling their exception rates, and thereby automatically restoring the class rates of 1931, as revised, "are just and reasonable, and not otherwise unlawful". They say, speaking broadly, that the ultimate con-

clusion reached by the Commission is not buttressed by adequate subsidiary findings, and that subsidiary findings in support of the ultimate conclusion, had they been made, would have had no support in the record. We cannot agree.

It is true, as the plaintiffs urge in their brief, that an order of the Commission is not valid unless the ultimate finding upon which it rests is supported by adequate subsidiary findings which in turn rest upon substantial evidence in the record. The rule is clearly stated and fully discussed, and the leading cases which established it are cited in *N. Y. C. RR. Co. et al.* v. *U. S. and I. C. C.*, decided in this District by a court such as this on June 30, last.

Paraphrasing the summation of the rule with respect to the adequacy of Commission findings as stated in the case last cited it will suffice to say here that the report of the Commission must contain sufficient basic or subsidiary findings of fact, (which ought to be clearly stated and identified as such so that a reviewing court will not be groping in the dark for the grounds of the Commission's ultimate conclusion) to warrant the reviewing court in concluding that the Commission had rational grounds for refusing to find, as the case might be, (1) that the proposed schedules are "just and reasonable," within the meaning of § 1(5) of the Act, or (2), are free of "unjust discrimination" prohibited by § 3, or (3), contain no undue or unreasonable preference, prejudice or disadvantage within the prohibitions of § 3(1).

An examination of the Commission's report in the instant case shows that it lived up to the rule. Well over a dozen subsidiary findings were made covering the nature, organization, and extent of the furniture industry; the volume and character of its traffic, and the extent to which it moves by truck, and the average length of haul when so moved and when moved by rail in less than carload lots. Findings also were made with respect to the transportation characteristics of furniture i. e. its weight, density, value, susceptibility to damage, terminal handling costs, and its desirability generally as traffic. No useful purpose will be served by a detailed recapitulation of all the findings, for they are to be found in the published report of the Commission cited above. It is true that no findings were made with respect to

the non-furniture items, such as clothes baskets and children's vehicles enumerated above, and that no specific findings were made comparing furniture rates with rates on non-related but comparable commodities. But this is not fatal for the reason that it has long been the rule that typical or representative findings resting upon typical or representative evidence are all that is required, otherwise the administrative burden in cases like this would be so great that the Commission would be bogged down in a mass of detail and unable to function. See *New England Divisions Case*, U. S. 184, 197, et seq. Certainly to require a full scale comparison of rates on comparable commodities in every rate case would be to require the impossible. Preoccupied as it is with rates, we must assume that in these cases the Commission has the general rate scale in mind for comparative purposes when setting or sanctioning a rate for any particular commodity, even though it may say nothing as to the rate scale at large. It will suffice to say that we find the subsidiary findings adequate to warrant our conclusion that the Commission had rational grounds for its conclusion that the schedules proposed by the railroads are "just and reasonable, and not otherwise unlawful", which last phrase we take to mean that the schedules are free of unjust discrimination prohibited by § 2 of the Act, and contain no undue or unreasonable preference, prejudice or disadvantage within the condemnation of § 3(1).

And it will also suffice to say that a careful examination of the voluminous record before the Commission discloses adequate evidence, although some of it is typical or representative to be sure, to support the subsidiary findings made. To analyse the record in detail and to discuss all of the arguments made with respect to it, would result in an opinion as long as the Book of Deuteronomy and as instructive and palatable reading as the "begat" chapters of the Book of Numbers. We content ourselves therefore with the general statement that a perusal of the record and a consideration of the arguments leaves us with the firm conviction that the Commission has not deviated from the rule stated earlier herein.

One further argument, however, with respect to the Com-

mission's report perhaps deserves brief mention. It is said that the Commission's ultimate finding or conclusion quoted above clearly shows on its face that the Commission itself was not convinced that the railroads had sustained their statutory burden of proof in the premises and, indeed, that it was convinced that the evidence did not support its ultimate conclusion. It is true that the Commission did not state its conclusion in terms of complete assurance. It said that the evidence as to the railroads' costs was "not conclusive" but added that it gave rise to "serious doubt as to whether sufficient revenue is derived from the exceptions basis to compensate for the cost of the service", and it said that the record was "not persuasive" that the proposed ratings would subject any shippers to undue prejudice.

The failure of the Commission to speak with full conviction is not fatal, however. The process of rate making involves the weighing of imponderables, the making of predictions as to future traffic, and presumptive reasoning from available data. It necessarily must proceed on the trial and error basis. We think the Commission was doing no more than realistically to face these facts when choosing the criticised phraseology, for terms of certainty would be only illusory. Who can tell in advance, for instance, how much traffic will move by rail and how much will be diverted to trucks by the higher rates?

The remaining arguments of the plaintiffs have been considered, but we see no occasion to consider each one or even to enumerate them. It will be enough to say that none of them persuade us that there is any basic infirmity in the action taken by the Commission, and that if some of the fears of unreasonableness, inequality or prejudice expressed by the shippers materalizes, remedial process is readily at hand under the Act.

The plaintiffs have voluntarily abandoned their contention that the second order of the Commission complained of (that of March 16, 1951, denying reopening and reconsideration by the entire Commission) violated the Administrative Procedure Act.

The Interstate Commerce Commission and it alone, advanced the proposition that the plaintiffs have no standing

to sue. The contention was not pressed at oral argument, however, and we feel that we can brush it aside with the comment that in our opinion it has no merit.

A judgment will be entered denying the motion for summary judgment and dismissing the complaint.

APPENDIX "D"

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

No. 51-353 Civil Action

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC., ET AL., *Plaintiffs*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

JUDGMENT OF DISMISSAL

WOODBURY, Circuit Judge, SWEENEY, Chief District Judge, and FORD, District Judge

In accordance with the opinion of the Court handed down on September 5, 1951 in the above entitled action, it is

ORDERED that the plaintiff's motion for summary judgment be and it is hereby denied and the complaint dismissed with costs taxed at $

By the Court,

(S.) HELEN I. TWEEDY,
Deputy Clerk.

Approved:

(S.) PETER WOODBURY
(S.) GEORGE C. SWEENEY
(S.) FRANCIS JW FORD

Judgment entered September 11, 1951.

JOHN A. CANAVAN,
Clerk,

by (S.) HELEN I. TWEEDY,
Deputy Clerk.